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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Michael Heffley,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-15-08241-PCT- JZB

ORDER

15 Plaintiff Michael Heffley seeks review of the Social Security Administration
16 Commissioner's decision denying him social security benefits under the Social Security
17 Act. (Doc. 1; Doc. 17.) For reasons below, the Court will affirm the Commissioner's
18 decision.

19 **I. Background**

20 On February 1, 2012, Plaintiff filed an Application for disability insurance
21 benefits. (AR¹ at 143-46.) Plaintiff asserts disability beginning on December 3, 2010.
22 (*Id.* at 143.) Plaintiff's Application was initially denied on September 20, 2012 (*id.* at 41),
23 and upon reconsideration on May 8, 2013 (*id.* at 54). On June 10, 2013, Plaintiff
24 requested a hearing. (*Id.* at 84-85.) After holding a hearing, Administrative Law Judge
25 (ALJ) Joan G. Knight denied Plaintiff's request for benefits in a decision dated July 16,
26 2014. (*Id.* at 18.) On August 26, 2015, the Appeals Council denied review of the ALJ's
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¹ Citations to "AR" are to the administrative record.

1 decision, making the ALJ's decision the final decision of the Commissioner of the Social
2 Security Administration. (*Id.* at 1-5.)

3 Having exhausted the administrative review process, on October 29, 2015,
4 Plaintiff sought judicial review of the ALJ's decision by filing a Complaint in this Court
5 pursuant to 42 U.S.C. § 405(g). (Doc. 1.) On March 14, 2016, Plaintiff filed an Opening
6 Brief, seeking remand of this case to the Social Security Administration for an award of
7 benefits. (Doc. 17.) On April 27, 2016, Defendant filed a Response Brief in support of
8 the Commissioner's decision. (Doc. 22.) On May 10, 2016, Plaintiff filed a Reply Brief.
9 (Doc. 23.)

10 **II. Legal Standards**

11 **a. Standard of Review**

12 The Social Security Act, 42 U.S.C. § 405(g), provides for judicial review of the
13 Commissioner's disability benefits determinations. The Court may set aside the
14 Commissioner's disability determination only if the determination is not supported by
15 substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.
16 2007); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). "Substantial evidence"
17 means more than a mere scintilla, but less than a preponderance; it is such relevant
18 evidence as a reasonable person might accept as adequate to support a conclusion."
19 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007); *see also Reddick v. Chater*,
20 157 F.3d 715, 720 (9th Cir. 1998).

21 In determining whether substantial evidence supports the ALJ's decision, the
22 Court considers the record as a whole, weighing both the evidence that supports and that
23 which detracts from the ALJ's conclusions. *Reddick*, 157 F.3d at 720; *Tylitzki v. Shalala*,
24 999 F.2d 1411, 1413 (9th Cir. 1993). The ALJ is responsible for resolving conflicts,
25 ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
26 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The Court "must
27 uphold the ALJ's decision where the evidence is susceptible to more than one rational
28 interpretation." *Andrews*, 53 F.3d at 1039. "However, a reviewing court must consider

the entire record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’” *Orn*, 495 F.3d at 630 (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). The Court reviews only those issues raised by the party challenging the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). Moreover, the Court reviews “only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.” *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

b. The ALJ’s Five-Step Evaluation Process

To be eligible for Social Security benefits, a claimant must show an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). A person is under a disability only:

if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

42 U.S.C. § 423(d)(2)(A).

The ALJ follows a five-step evaluation process to determine whether an applicant is disabled under the Social Security Act:

The five-step process for disability determinations begins, at the first and second steps, by asking whether a claimant is engaged in “substantial gainful activity” and considering the severity of the claimant’s impairments. *See* 20 C.F.R. § 416.920(a)(4)(i)-(ii). If the inquiry continues beyond the second step, the third step asks whether the claimant’s impairment or combination of impairments meets or equals a listing under 20 C.F.R. pt. 404, subpt. P, app. 1 and meets the duration requirement. *See id.* § 416.920(a)(4)(iii). If so, the claimant is considered disabled and benefits are awarded, ending the inquiry. *See id.* If the process continues beyond the third step, the fourth and fifth steps consider the claimant’s “residual functional capacity” in determining whether the claimant can still do past relevant work or make an adjustment to other work. *See id.* § 416.920(a)(4)(iv)-(v).

1 *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). “The burden of proof is on the
2 claimant at steps one through four, but shifts to the Commissioner at step five.” *Bray v.*
3 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

4 Applying the five-step evaluation process, the ALJ found that Plaintiff is not
5 disabled and is not entitled to benefits. (*Id.* at 18.) At step one, the ALJ found that
6 Plaintiff meets the insured status requirements of the Social Security Act through
7 December 31, 2015, and Plaintiff has not engaged in substantial gainful activity since
8 December 3, 2010, the alleged onset date. (*Id.* at 12.) At step two, the ALJ determined
9 that Plaintiff has the following severe impairments: “degenerative disc disease of the
10 cervical, thoracic and lumbar spine; degenerative joint disease of the feet; osteoporosis;
11 status post orchiectomy with groin pain; and left hip degenerative changes (20 CFR
12 404.1520(c)).” (*Id.*)

13 At step three, the ALJ found that “[Plaintiff] does not have an impairment or
14 combination of impairments that meets or medically equals the severity of one of the
15 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d),
16 404.1525 and 404.1526).” (*Id.* at 14.) At step four, the ALJ found that Plaintiff “has the
17 residual functional capacity to perform a range of sedentary work as defined in 20 CFR
18 404.1567(a) except: [Plaintiff] can frequently climb ramps and stairs and can
19 occasionally climb ladders ropes and scaffolds. He should avoid concentrated exposure to
20 extreme cold, wetness and vibration and should avoid even moderate exposure to
21 hazards.” (*Id.*) The ALJ determined that Plaintiff could perform his past work as a
22 manager/distribution warehouse. (*Id.* at 18.) Given that finding, the ALJ concluded that
23 Plaintiff is not disabled under sections 216(i) and 223(d) of the Social Security Act. (*Id.*)

24 **III. Analysis**

25 Plaintiff argues that the ALJ erred in weighing the medical opinion evidence,
26 discounting Plaintiff’s symptom testimony, and failing to rely on a hypothetical from the
27 vocational expert in determining that Plaintiff can perform his past relevant work. (Doc.
28

17.) The Court addresses these arguments below.²

a. Weighing of Medical Opinion Evidence

i. Legal Standard

The Ninth Circuit distinguishes between the opinions of treating physicians, examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating physician's opinion and more weight to the opinion of an examining physician than to one of a non-examining physician. *See Andrews*, 53 F.3d at 1040-41; *see also* 20 C.F.R. § 404.1527(c)(2)-(6). If it is not contradicted by another doctor's opinion, the opinion of a treating or examining physician can be rejected only for "clear and convincing" reasons. *Lester*, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). "If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Garrison*, 759 F.3d at 1012 (quoting *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)).

An ALJ can meet the "specific and legitimate reasons" standard "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986). But "[t]he ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Embrey*, 849 F.2d at 421-22. "The opinion of a non-examining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining *or* a treating physician." *Lester*, 81 F.3d at 831 (emphasis in original) (citations omitted).

ii. Dr. Brad Hayman's Opinions

² In the "Statement of Issues Presented For Review" section on page three of Plaintiff's Opening Brief, Plaintiff references the ALJ's "failure to follow the Appeals Council's remand order." (Doc. 17 at 3.) However, there is no mention of a "remand order" in the remainder of Plaintiff's Opening Brief or in his Reply Brief. Therefore, the Court will disregard Plaintiff's reference to such an order.

1 Plaintiff complains that the ALJ failed to provide specific and legitimate reasons
2 supported by substantial evidence for the weight given to Dr. Hayman's opinions. (Doc.
3 17 at 9.)

4 On June 24, 2013, Dr. Hayman, Plaintiff's treating podiatrist, completed a Medical
5 Source Statement of Physical Ability to Do Work-Related Activities. (AR 456-57.) Dr.
6 Hayman opined that Plaintiff suffers from "severe painful arthritis of the right 1st
7 metatarsal phalangeal joint." (*Id.* at 456.) Dr. Hayman further opined that Plaintiff can
8 occasionally and frequently lift and/or carry less than five pounds, can stand and/or walk
9 for less than one hour, can sit for eight hours, needs to elevate his right leg/foot for 30
10 minutes every hour, can never climb, balance, stoop, kneel, crouch, or crawl, and is
11 unlimited in reaching, handling, fingering, feeling, seeing, hearing, and speaking. (*Id.* at
12 456-57.) Dr. Hayman stated that Plaintiff does not use an assistive device, and he opined
13 that Plaintiff does not have any environmental restrictions. (*Id.* at 456.) Dr. Hayman
14 further opined that Plaintiff's limitations are "perpetual unless [Plaintiff] has the
15 recommended surgery." (*Id.* at 457.)

16 The ALJ gave Dr. Hayman's opinions little weight because those opinions are
17 inconsistent with Plaintiff's statements regarding his daily activities and other portions of
18 Plaintiff's testimony and/or his other reports in the record, including the amount Plaintiff
19 can lift, and that his pain was reduced with medication, orthotics and limiting the amount
20 of time on his feet. (*Id.* at 16-17.) The Court finds that the ALJ's citation to Plaintiff
21 having good pain control with medication and staying off of his feet, alone, is an
22 insufficient basis to discount Dr. Hayman's opinions. However, the ALJ cited to
23 evidence that directly contradicts relevant portions of Dr. Hayman's opinions, which the
24 Court does find sufficient. More specifically, Plaintiff testified and/or reported in other
25 portions of the record that he exercises for an hour on a daily basis, sees a personal trainer
26 two to three days a week for an hour, he was digging and working on irrigation systems
27 during the time he alleges to have been disabled, he is able to lift 15 pounds, and he can
28 shop. (*Id.* at 174-75, 370, 450, 686, 725, 936.) This evidence directly contradicts Dr.

1 Hayman's opinion that Plaintiff can stand for less than one hour during an eight-hour
2 work day, can carry less than five pounds, and can never climb, balance, stoop, kneel,
3 crouch, or crawl. The Court finds these inconsistencies to be sufficiently specific,
4 legitimate, and supported by substantial evidence. *Morgan v. Comm'r of Soc. Sec.*
5 *Admin.*, 169 F.3d 595, 602-03 (9th Cir. 1999) (an ALJ can properly discount the opinion
6 of a treating physician because it is inconsistent with other evidence in the record).

7 **iii. Dr. El-Harakeh's Opinions**

8 On June 24, 2013, Dr. El-Harakeh, a pulmonologist, completed a Medical Source
9 Statement of Physical Ability to Do Work-Related Activities form. (AR 454-55.) Dr. El-
10 Harakeh opined that Plaintiff suffers from asthma and shortness of breath. (*Id.* at 454.)
11 Dr. El-Harakeh further opined that Plaintiff can occasionally and frequently carry 20
12 pounds, uses a cane (although it is unknown to Dr. El-Harakeh whether it is medically
13 necessary), and, based on Plaintiff's report of bone pain, Plaintiff can stand and/or walk
14 less than one hour. (*Id.* at 454.) Dr. El-Harakeh also opined that Plaintiff can sit for less
15 than one hour during an eight-hour workday, can occasionally climb, balance, stoop,
16 kneel, crouch, and crawl, and is unlimited in reaching, handling, fingering, feeling,
17 seeing, hearing, and speaking. (*Id.* at 454-55.) Finally, Dr. El-Harakeh opined that
18 Plaintiff has restrictions in temperature extremes, chemicals, and dust. (*Id.* at 455.)

19 The ALJ gave specific and legitimate reasons supported by substantial evidence
20 for giving Dr. El-Harakeh's opinions little weight. (*Id.* at 13, 17.) First, the ALJ stated
21 that Dr. El-Harakeh is a pulmonologist, and his opinions regarding Plaintiff's restrictions
22 in walking, sitting, and performing postural functions outside of those related to asthma
23 are, as stated on the form, based on Plaintiff's allegations of pain and not objective
24 medical evidence. (*Id.* at 13, 454.) Further, the ALJ found that Dr. El-Harakeh's
25 opinions were rendered when Plaintiff was suffering from an acute period of illness, and
26 that Dr. El-Harakeh's opinions are inconsistent with his own treatment notes and other
27 medical evidence in the record. The ALJ cited to Dr. El-Harakeh's treatment note dated
28 only a few weeks after his opinions, which states Plaintiff reported significant

1 improvement, and a record dated July 22, 2013, which indicates Plaintiff's pulmonary
2 function test was within normal limits. (*Id.* at 487, 726-27, 935.) These reasons are
3 specific, legitimate, and supported by substantial evidence. *See Tommassetti v. Astrue*,
4 533 F.3d 1038, 1041 (9th Cir. 2008) (An ALJ may properly discount a treating
5 physician's opinions because the opinions are inconsistent with treatment records,
6 conclusory or inadequately supported, or based on Plaintiff's reasonably discounted
7 subjective symptoms).

8 Plaintiff argues that Dr. El-Harakeh's opinions are "both consistent with his
9 treatment notes and the opinions of Drs. H[a]yman and Zastrow." (Doc. 17 at 11.)
10 However, Plaintiff only references one of Dr. El-Harakeh's treatment records indicating
11 Plaintiff was suffering from fatigue since January 2013. Further, Dr. El-Harakeh's
12 opinions are inconsistent with those of Dr. Hayman with regard to the amount of weight
13 Plaintiff can lift, the length of time Plaintiff can sit, and Plaintiff's abilities to climb,
14 balance, stoop, kneel, crouch, and crawl. (*Id.* at 454-55, 456-57.)

15 Plaintiff also argues that the ALJ erred by finding Plaintiff's testimony that he
16 uses a recliner for hours during the day is consistent with Plaintiff's ability to sit as a
17 primary position. (Doc. 17 at 10-11.) However, Plaintiff appears to concede in his
18 Opening Brief that he is "largely unimpaired in regard to sitting . . ." (Doc. 17 at 9.)
19 And, notably, Dr. Hayman, one of the physicians Plaintiff argues should be given more
20 weight, opined that Plaintiff can sit for eight hours during the work day. (*Id.* at 457.)
21 Further, even if the ALJ could not reasonably conclude that Plaintiff's ability to sit
22 throughout the day is supported by Plaintiff's statements regarding how long he uses a
23 recliner, the ALJ gave other reasons for discounting Dr. El-Harakeh's opinions, which
24 the Court finds are specific, legitimate, and supported by substantial evidence. For the
25 reasons above, the Court finds that the ALJ's treatment of Dr. El-Harakeh's opinions is
26 free of harmful error and supported by substantial evidence.

27 **iv. Jed Zastrow's Opinions**

28 On March 4, 2014, Plaintiff's Chiropractor, Jed Zastrow, completed a Pain

1 Questionnaire. (*Id.* at 458.) Mr. Zastrow opined that Plaintiff has pain in his right
 2 scapula, lower back at his SI joints, and his feet, the pain is aching stabbing, and burning,
 3 increased activity, stooping, and driving longer distances makes the pain worse, the pain
 4 keeps Plaintiff from “picking up stuff, bending, squatting, standing for long periods,” and
 5 reaching for things with his right arm, and “chiropractic helps, but nothing can take the
 6 pain away completely.”

7 The ALJ gave Mr. Zastrow’s opinions little weight. (*Id.* at 17.) Because Mr.
 8 Zastrow is considered an “other source” under Defendant’s regulations in effect at the
 9 time, the ALJ was only required to give germane reasons for discounting his opinions.
 10 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1); *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th
 11 Cir. 2012) (An ALJ may discount testimony from “other sources” if the ALJ “gives
 12 reasons germane to each witness for doing so”).

13 The ALJ found that Mr. Zastrow’s opinions regarding Plaintiff’s pain are not in
 14 the form of specific functional limitations and are inconsistent with the treatment records,
 15 citing to records where Plaintiff stated his pain is mild and he was doing yard work as
 16 recent as 2014. (AR 17, 561-64, 571.) These reasons are sufficient and supported by
 17 substantial evidence. *Molina*, 674 F.3d at 1111.

18 **v. Non-examining Agency Physicians’ Opinions**

19 Finally, Plaintiff asserts that the ALJ erred in her assessment of the non-examining
 20 agency physician’s opinions. (Doc. 17 at 12.) Plaintiff’s argument has no merit. First,
 21 the ALJ gave specific reasons for giving “some weight” to the non-agency physician’s
 22 opinions, including that other evidence in the record (Plaintiff’s statements to his
 23 physicians) supported a conclusion that Plaintiff does have increased pain while standing
 24 and walking. (AR 16.) Second, as Plaintiff appears to concede, any error in including
 25 greater limitations in the RFC than opined by these physicians is harmless. (Doc. 17 at
 26 12); *Stout v. Comm’r, SSA*, 454 F.3d 1050, 1055 (9th Cir. 2006) (harmless error is a
 27 mistake that is “nonprejudicial to the claimant or irrelevant to the ALJ’s ultimate
 28 disability conclusion.”). Plaintiff also generally asserts that the ALJ rejected all of the

1 medical opinion evidence, and, therefore, the ALJ's decision is not supported by
 2 substantial evidence. (Doc. 17 at 5, 11-12.) However, Plaintiff fails to cite to any
 3 authority that the ALJ is required to give a certain number of medical source opinions full
 4 weight. Further, as stated above, the ALJ gave "some weight" to the state agency
 5 reviewing physicians, and included in the RFC the environmental limitations opined by
 6 those physicians, which are greater than the limitations opined by Plaintiff's treating
 7 podiatrist. Likewise, the ALJ gave "partial weight" to Dr. Bendheim's opinions. The
 8 ALJ explained the controverting medical evidence in the record and the basis for the
 9 weight given to each opinion source. (AR 16-17.)

10 **b. Plaintiff's Symptom Testimony**

11 **i. Legal Standard**

12 Plaintiff also argues that the ALJ erred in evaluating Plaintiff's symptom
 13 testimony. (Doc. 17 at 14.) An ALJ engages in a two-step analysis to determine whether
 14 a claimant's testimony regarding subjective pain or symptoms is credible. *Garrison*, 759
 15 F.3d at 1014-15 (citing *Lingenfelter*, 504 F.3d at 1035-36). "First, the ALJ must
 16 determine whether the claimant has presented objective medical evidence of an
 17 underlying impairment 'which could reasonably be expected to produce the pain or other
 18 symptoms alleged.'" *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947
 19 F.2d 341, 344 (9th Cir. 1991) (en banc)). The claimant is not required to show objective
 20 medical evidence of the pain itself or of a causal relationship between the impairment and
 21 the symptom. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996). Instead, the
 22 claimant must only show that an objectively verifiable impairment "could reasonably be
 23 expected to produce his pain." *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d
 24 at 1282); *see also Carmickle v. Comm'r, SSA*, 533 F.3d 1155, 1160-61 (9th Cir. 2008)
 25 ("requiring that the medical impairment 'could reasonably be expected to produce' pain
 26 or another symptom . . . requires only that the causal relationship be a reasonable
 27 inference, not a medically proven phenomenon").

28 Second, if a claimant shows that she suffers from an underlying medical

1 impairment that could reasonably be expected to produce her pain or other symptoms, the
 2 ALJ must “evaluate the intensity and persistence of [the] symptoms” to determine how
 3 the symptoms, including pain, limit the claimant’s ability to work. *See* 20 C.F.R. §
 4 404.1529(c)(1). General assertions that the claimant’s testimony is not credible are
 5 insufficient. *See Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ must
 6 identify “what testimony is not credible and what evidence undermines the claimant’s
 7 complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834).

8 In weighing a claimant’s credibility, the ALJ may consider many factors,
 9 including, “(1) ordinary techniques of credibility evaluation, such as the claimant’s
 10 reputation for lying, prior inconsistent statements concerning the symptoms, and other
 11 testimony by the claimant that appears less than candid; (2) unexplained or inadequately
 12 explained failure to seek treatment or to follow a prescribed course of treatment; and (3)
 13 the claimant’s daily activities.” *Smolen*, 80 F.3d at 1284; *see Orn*, 495 F.3d at 637-39.
 14 The ALJ also considers “the claimant’s work record and observations of treating and
 15 examining physicians and other third parties regarding, among other matters, the nature,
 16 onset, duration, and frequency of the claimant’s symptom; precipitating and aggravating
 17 factors; [and] functional restrictions caused by the symptoms” *Smolen*, 80 F.3d at
 18 1284 (citation omitted).

19 At this second step, the ALJ may reject a claimant’s testimony regarding the
 20 severity of his or her symptoms only if the ALJ “makes a finding of malingering based on
 21 affirmative evidence,” *Lingenfelter*, 504 F.3d at 1036 (quoting *Robbins*, 466 F.3d at 883),
 22 or if the ALJ offers “clear and convincing reasons” for finding the claimant not credible.
 23 *Carmickle*, 533 F.3d at 1160 (quoting *Lingenfelter*, 504 F.3d at 1036). “‘The clear and
 24 convincing standard is the most demanding required in Social Security Cases.’”
 25 *Garrison*, 793 F.3d at 1015 (quoting *Moore v. Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th
 26 Cir. 2002)).

27 **ii. The ALJ did not err in evaluating Plaintiff’s symptom**
 28 **testimony.**

Plaintiff alleged that he is disabled due to degenerative joint disease, osteoporosis,

1 osteoarthritis, nerve damage and problems with bones in his feet. (AR 165.) Plaintiff
2 claims due to pain in his groin, he is unable to stand or sit for more than a few minutes,
3 due to pain in his feet and hip, he can only walk one to two blocks and stand for 15
4 minutes, due to a spine injury he cannot bend or lift, and he was prescribed a cane, which
5 is necessary for him to use when outside the home. (*Id.* at 31, 34, 174, 198, 204.)

6 The ALJ discounted Plaintiff's statements regarding his impairments because: (1)
7 with regard to his foot, hip, and back pain, his allegations of disabling pain were
8 inconsistent with his reported daily activities and other objective medical evidence in the
9 record; and (2) with regard to Plaintiff's groin pain, Plaintiff has not pursued additional
10 treatment beyond the Lyrica prescribed to him and he worked successfully for three years
11 while he had the condition. (AR 15-16.)

12 The Court finds the ALJ's reasons are clear, convincing, and supported by
13 substantial evidence. The ALJ cited Plaintiff's statements regarding his activities,
14 including exercising daily for an hour, digging irrigation systems during the time he
15 alleges disability, and shopping on his own, and going to dinner or movies up to three
16 times a week, which directly contradict Plaintiff's statements regarding his disabling foot,
17 hip, and back pain. (*Id.* at 15, 174, 202, 370, 921, 936.) The ALJ further cited to specific
18 objective medical evidence that contradicts the severity of Plaintiff's pain in his foot, hip,
19 and back, including records showing great toe strength and extension, no nerve deficits
20 identified in his feet bilaterally, and he was observed to walk normally without a cane and
21 gait was normal showing no ataxia or unsteadiness, even though Plaintiff alleged he
22 requires the use of a cane to ambulate, MRIs and X-rays showing only minor
23 degenerative changes, and, a physical examination finding normal range of motion, no
24 tenderness, no spasms, and straight leg raise tests were negative. (*Id.* at 364, 366-67,
25 370-72, 466, 714, 730, 830, 922, 924.) The ALJ may discount symptom testimony based
26 on inconsistencies with the medical record and Plaintiff's daily activities. *Thomas v.*
27 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

28 Moreover, the ALJ concluded that Plaintiff's treatment of his groin pain with

1 medication was conservative, and Plaintiff's ability to work in his past job full time for
 2 three years with his groin pain belies his claim that his groin pain is disabling. (AR 16,
 3 29-30, 32.) The Court finds these reasons are clear, convincing, and supported by
 4 substantial evidence. *Thomas*, 278 F.3d at 958-59 (the ALJ may consider a Plaintiff's
 5 work history in assessing credibility); *Parra*, 481 F.3d at 751 ("evidence of 'conservative
 6 treatment' is sufficient to discount a claimant's testimony regarding severity of an
 7 impairment").

8 Plaintiff argues generally that the ALJ erred in assessing Plaintiff's credibility
 9 because Plaintiff had four foot surgeries, which are not conservative and routine. (Doc.
 10 17 at 14-15.) However, as noted above, the ALJ cited to specific objective medical
 11 records and Plaintiff's own statements that were inconsistent with Plaintiff's claims of
 12 disabling foot, hip, and back pain. Further, Plaintiff does not dispute that the treatment
 13 for Plaintiff's groin pain was conservative, or that Plaintiff was able to work for three
 14 years with the groin pain. For these reasons, the Court finds that the ALJ provided clear
 15 and convincing reasons supported by substantial evidence for discounting Plaintiff's
 16 symptom testimony.³

17 **c. Vocational Support for Plaintiff's Ability to Perform Past Work**

18 Finally, Plaintiff complains that the ALJ erred at step four of the sequential
 19 process because Plaintiff suffers from both exertional and non-exertional limitations, but
 20 the ALJ did not pose a hypothetical to the vocational expert who testified at the hearing.
 21 (Doc. 17 at 12-13.)

22 "[A] claimant will be found to be 'not disabled' when it is determined that he or

23
 24 ³ Plaintiff asserts, for the first time in his Reply, that "[i]f this Court affirms
 25 Defendant's denial of [Plaintiff's] claim, it will result in a denial of due process as the
 26 ALJ's credibility determination is contrary to Defendant's newly published SSR 16-3p."
 27 (Doc. 23 at 9.) However, as Plaintiff notes, SSR 16-3p did not become effective until
 28 March 2016, almost two years after the ALJ's decision at issue in this case. (AR 18.)
 Further, although the SSR states that "we clarify that subjective symptom testimony
 evaluation is not an examination of an individual's character," it states that in assessing
 an individual's description of his or her impairments and symptoms, Defendant will
 consider the consistency between the individual's statements and other record evidence.
 SSR 16-3p, 2016 WL 1119029. Here, the ALJ identified numerous inconsistencies
 between Plaintiff's statements and other record evidence.

1 she retains the RFC to perform: 1. the actual functional demands and job duties of a
 2 particular past relevant job; or 2. the functional demands and job duties of the occupation
 3 as generally required by employers throughout the national economy.” SSR 82-61, 1982
 4 WL 31387. The regulations further provide the following:

5 (2) Determining whether you can do your past relevant work.
 6 We will ask you for information about work you have done in
 7 the past. We may also ask other people who know about your
 8 work. (See § 404.1565(b).) We may use the services of
 9 vocational experts or vocational specialists, or other
 10 resources, such as the “Dictionary of Occupational Titles”
 11 and its companion volumes and supplements, published by
 12 the Department of Labor, to obtain evidence we need to help
 13 us determine whether you can do your past relevant work,
 14 given your residual functional capacity. A vocational expert
 15 or specialist may offer relevant evidence within his or her
 16 expertise or knowledge concerning the physical and mental
 17 demands of a claimant’s past relevant work, either as the
 18 claimant actually performed it or as generally performed in
 19 the national economy. Such evidence may be helpful in
 20 supplementing or evaluating the accuracy of the claimant’s
 21 description of his past work. In addition, a vocational expert
 22 or specialist may offer expert opinion testimony in response
 23 to a hypothetical question about whether a person with the
 24 physical and mental limitations imposed by the claimant’s
 25 medical impairment(s) can meet the demands of the
 26 claimant’s previous work, either as the claimant actually
 27 performed it or as generally performed in the national
 28 economy.

(3) If you can do your past relevant work. If we find that you
 have the residual functional capacity to do your past relevant
 work, we will determine that you can still do your past work
 and are not disabled. We will not consider your vocational
 factors of age, education, and work experience or whether
 your past relevant work exists in significant numbers in the
 national economy.

20 C.F.R. § 404.1560(b). Although an ALJ may rely on a vocational expert’s testimony
 at step four to determine whether a Plaintiff can perform past relevant work, the ALJ is
 not always required to do so. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (“In
 the instant case, since Matthews failed to show that he was unable to return to his
 previous job as a receiving clerk/inspector, the burden of proof remained with Matthews.
 The vocational expert’s testimony was thus useful, but not required.”). Further, “the best
 source for how a job is generally performed is usually the Dictionary of Occupational

1 Titles.” *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001).

2 Here, the ALJ concluded that Plaintiff has the RFC to “perform a range of
3 sedentary work as defined in 20 CFR 404.1567(a) except: the claimant can frequently
4 climb ramps and stairs and can occasionally climb ladders and ropes and scaffolds. He
5 should avoid concentrated exposure to extreme cold, wetness and vibrations and should
6 avoid even moderate exposure to hazards.” (AR 14.) During the hearing, the vocational
7 expert classified Plaintiff’s past work as a “manager distribution warehouse, 185.167-
8 018, SVP-6, sedentary as described in the DOT, but [Plaintiff] describes this more of a
9 light working level.” (*Id.* at 37.)

10 The DOT includes the following description for “manager/distribution
11 warehouse,” 185.167-018:

12 Directs and coordinates activities of wholesaler’s distribution
13 warehouse: Reviews bills of lading for incoming merchandise
14 and customer orders in order to plan work activities. Assigns
15 workers to specific duties, such as verifying amounts of and
16 storing incoming merchandise and assembling customer
17 orders for delivery. Establishes operational procedures for
18 verification of incoming and outgoing shipments, handling
19 and disposition of merchandise, and keeping of warehouse
20 inventory. Coordinates activities of distribution warehouse
21 with activities of sales, record control, and purchasing
22 departments to ensure availability of merchandise. Directs
23 reclamation of damaged merchandise.

24

25 STRENGTH: Sedentary Work - Exerting up to 10 pounds of
26 force occasionally (Occasionally: activity or condition exists
27 up to 1/3 of the time) and/or a negligible amount of force
28 frequently (Frequently: activity or condition exists from 1/3
to 2/3 of the time) to lift, carry, push, pull, or otherwise move
objects, including the human body. Sedentary work involves
sitting most of the time, but may involve walking or standing
for brief periods of time. Jobs are sedentary if walking and
standing are required only occasionally and all other
sedentary criteria are met.

. . . .

Climbing: Not Present - Activity or condition does not exist

. . . .

Exposure to Weather: Not Present - Activity or condition
does not exist

1 Extreme Cold: Not Present - Activity or condition does not
2 exist

3 Extreme Heat: Not Present - Activity or condition does not
4 exist

5 Wet and/or Humid: Not Present - Activity or condition does
6 not exist

7

8 Vibration: Not Present - Activity or condition does not exist

9 Atmospheric Cond.: Not Present - Activity or condition does
10 not exist

11 Moving Mech. Parts: Not Present - Activity or condition does
12 not exist

13 Electric Shock: Not Present - Activity or condition does not
14 exist

15 High Exposed Places: Not Present - Activity or condition
16 does not exist

17 Radiation: Not Present - Activity or condition does not exist

18 Explosives: Not Present - Activity or condition does not exist

19 Toxic Caustic Chem.: Not Present - Activity or condition
20 does not exist

21 Other Env. Cond.: Not Present - Activity or condition does
22 not exist

23 DICOT 185.167-018 (G.P.O.), 1991 WL 671292.

24 In his Opening Brief, Plaintiff does not contend that he is unable to do his past
25 relevant work based on the RFC assessed by the ALJ. (Doc. 17.) Further, Plaintiff
26 appears to concede that if there is no conflict between the DOT description of Plaintiff's
27 past work and the assessed RFC, the ALJ may rely entirely on the DOT in determining
28 that Plaintiff can perform his past relevant work. (Doc. 23 at 4) ("If Mr. Heffley were
found capable of a full range of sedentary work, the ALJ could rely on the [DOT]
alone."). Rather, Plaintiff appears to argue that the ALJ erred in failing to pose a
hypothetical to the vocational expert during the hearing to determine whether Plaintiff
can perform his past work because Plaintiff asserts that the assessed RFC contains

1 limitations that conflict with the vocational expert's classification of Plaintiff's past work
2 as sedentary. (Doc. 17 at 12-13.)

3 Plaintiff's argument lacks merit. First, Plaintiff does not cite to any authority to
4 support his claim that the ALJ was required to pose and rely on a hypothetical to the
5 vocational expert to determine whether Plaintiff could perform his past relevant work at
6 step four. In his Reply, Plaintiff argues that the limitations regarding climbing and the
7 additional environmental limitations assessed by the ALJ are not addressed by the DOT
8 and, therefore, the ALJ was required to obtain "vocational expert testimony to provide
9 insight as to what impact these limitations would have on either [Plaintiff's] ability to
10 engage in his past relevant work as a distribution warehouse manager . . . or alternative
11 work in the national economy." (Doc. 23 at 5.) To support this argument, Plaintiff cites
12 to SSR 83-14. However, SSR 83-14 does not require the use of vocational testimony at
13 step four. *See* SSR 83-14, 1983 WL 31254.

14 Further, Plaintiff does not identify any "obvious or apparent" conflict between the
15 RFC and the DOT's description for the manager/distribution warehouse classification.
16 *See Gutierrez v. Colvin*, 844 F.3d 804, 808 (9th Cir. 2016) ("For a difference between an
17 expert's testimony and the *Dictionary's* listings to be fairly characterized as a conflict, it
18 must be obvious or apparent. This means that the testimony must be at odds with
19 the *Dictionary's* listing of job requirements that are essential, integral, or expected. This
20 is not to say that ALJs are free to disregard the *Dictionary's* definitions or take them with
21 a grain of salt—they aren't. But tasks that aren't essential, integral, or expected parts of a
22 job are less likely to qualify as apparent conflicts that the ALJ must ask about."). Instead,
23 Plaintiff generally asserts that the climbing and environmental limitations assessed by the
24 ALJ in the RFC would impact whether Plaintiff could perform past work because work as
25 a distribution warehouse manager is "obviously" done in a work environment containing
26 concentrated exposure to extreme cold and "likely containing ramps and stairs."
27 However, Plaintiff does not cite to any authority to support these assertions. And, as
28 stated above, the DOT description for manager/distribution warehouse does not indicate

1 that it requires climbing ramps and stairs or exposure to extreme cold, wetness, vibration,
2 or hazards.

3 Because Plaintiff has failed to show any “obvious or apparent” conflict, the ALJ
4 had no duty to inquire further of the vocational expert during the hearing. Further,
5 Plaintiff has not argued or shown that he cannot perform his past relevant work as
6 generally performed. Therefore, the Court finds the ALJ’s conclusion that Plaintiff can
7 perform his past work to be free of harmful legal error and supported by substantial
8 evidence.

9 Accordingly,

10 **IT IS ORDERED** that the Commissioners’ decision is affirmed.

11 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
12 accordingly and terminate this case.

13 Dated this 28th day of March, 2017.

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15 
16 Honorable John Z. Boyle
17 United States Magistrate Judge
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